IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, et al., *Appellants*

v.

UNITED STATES, et al., *Appellees*

&

EDDIE THOMAS, SR., et al., *Intervenors*

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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THOMAS F. AKINS, PAUL PRIDE, JAMES ANDREWS,
Appellants

v.

UNITED STATES AND BENJAMIN CIVILETTI,
ATTORNEY GENERAL,
Appellees,

&

EDDIE THOMAS, SR. et al.,
Intervenors.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Members of the Board of Supervisors for Warren County, Mississippi, appeal from the final judgment of

a three-judge § 5 court for the District of Columbia holding that for purposes of preclearance under § 5 of the Voting Rights Act the "non-retrogression" standard established in *Beer* v. *United States,* 425 U.S. 130 (1976), requires "a black population of at least 65% . . . to provide [black] voters with an opportunity to elect a candidate of their choice," and that professionals engaged in drafting redistricting plans must consider "the black population percentage required in a district to give blacks an equal chance of electing a candidate of their choice."

OPINIONS BELOW

The case has generated significant judicial activity. The decision appealed from is unreported and reprinted in Appendix A. A Supplemental "Order" issued by the court below on August 23, 1979, is found in Appendix B. A bench opinion issued by the Circuit Court of Warren County on August 3, 1979, is reproduced in Appendix C. An opinion by Fifth Circuit Judge Charles Clark, sitting by designation as a district judge, issued on September 7, 1979, is found in Appendix D. A second opinion, dated September 20, 1979, is found in Appendix E. The unpublished opinion of a three-judge § 5 court sitting in the Southern District of Mississippi previously granting preclearance is found in Appendix F.

JURISDICTION

The judgment of the three-judge court for the District of Columbia was entered on July 31, 1979. A notice of appeal to this Court was filed on August 6, 1979, and is reproduced in Appendix G. This appeal is

being docketed within ninety days from the entry of final judgment below. Jurisdiction is invoked under 42 U.S.C. § 1973c. *Beer* v. *United States,* 425 U.S. 130 (1976).

QUESTIONS PRESENTED

I. In the drafting of redistricting plans, are professionals required to consider the black population required to give black citizens an equal chance of electing candidates of their choice?

II. May social, political and economic evidence currently employed in constitutional voter-dilution cases be utilized by a § 5 court to sustain a decision that due to past discrimination a district must contain a black population of at least 65% or a black voting age population of at least 60% to "provide black voters with an opportunity to elect a candidate of their choice"?

III. If § 5 does warrant a construction which requires covered jurisdictions to compensate for past discrimination, is there a resulting violation of the Fourteenth and Fifteenth Amendments?

IV. Under what circumstances should a § 5 court, after denying declaratory relief, retain jurisdiction in order to insure that any further elections by the covered jurisdiction meet statutory criteria?

STATUTES

In pertinent part, § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c provides:

> [No change in] any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting [may be precleared absent a showing that such change] does not have

the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

STATEMENT OF THE CASE

I. Background

Warren County is located in the west-central portion of Mississippi. According to the 1970 census, it has a total population of 44,981 of whom 26,474 (58.8%) are white and 18,355 (40.8%) are black. Within the county is one major metropolitan area, the city of Vicksburg, which contains over half of the county's total population and approximately two-thirds of its blacks. Of the 25,478 persons in Vicksburg, 12,824 (50.3%) are white and 12,568 (49.3%) are black.

Under Mississippi law, the county must be divided into five districts for the election of members of the Board of Supervisors, the county's governing body. Although charged with a variety of duties, the Board's primary responsibility is the construction and maintenance of county roads and bridges. This responsibility does not extend into the corporate limits of Vicksburg since the city's governing body provides its own construction/maintenance unit.

From 1929 to 1970, county government functioned under a districting format with practical and constitutional defects. Under what is referred to as the "1929 Plan," (Map 1) three supervisors' districts fell within the city limits of Vicksburg, thereby placing all construction and maintenance responsibility on two supervisors. The plan was also seriously malapportioned, *e.g.*, one rural district (5) had more than twice the

population of one located within the city limits (3). According to the 1970 census, its breakdown by population and race is as follows:

District	Total Pop.	White	Percent White	Black	Percent Black	Other	Percent Other
1	9,827	5,934	60.38%	3,871	39.39%	22	0.22%
2 City	7,566	2,717	35.91%	4,807	63.53%	42	0.55%
3 Dis-	6,217	3,066	49.32%	3,124	50.25%	27	0.43%
4 tricts	7,539	3,321	44.05%	4,206	55.79%	12	0.16%
5	13,832	11,436	82.68%	2,347	16.97%	49	0.35%

In 1970, the county voluntarily undertook to redistrict in an attempt to (1) equalize road, bridge and area responsibilities for each member of the Board of Supervisors as well as (2) meet one-man-one-vote requirements while also (3) maintaining its statutory responsibilities under § 5. The fact that the three majority black districts within the city under the 1929 Plan, each of which contained far fewer than the optimum population of 9,000,[1] were to be melded into districts containing both rural and urban segments has resulted in a major confrontation between county goverment, the Voting Rights Section of the Department of Justice (hereafter the "Department") and the Lawyers' Committee. As a result, no district elections have been held in eight years. This fact, and the procedural history of the "case" in general, bear out Mr. Justice Powell's admonition that there is an immediate "need to bring a measure of common sense" to the application of § 5. *Berry* v. *Doles,* 438 U.S. 190, 201 (1978) (Powell, J., concurring).

[1] With a total population in the neighborhood of 45,000, the 9,000 figure represents minimal percentage deviancy within the five districts.

II. 1970-1977: Three-Judge Court Litigation in the Southern District of Mississippi

A. Background

In 1970 Comprehensive Planners, Inc. (CPI) was retained to draft a county redistricting proposal which was subsequently approved by the Board and submitted to the Department for preclearance. Despite an objection filed by the Attorney General, general elections were held pursuant to the 1970 Plan in November of 1971. Subsequently, on February 12, 1973, after the Board's submission of supplemental data, the Department assumed what was to become its unalterable position (regardless of the submission in question):

> We fully understand that the officials of Warren County did not participate in the formulation of the redistricting plan and that the proposal was drawn without instruction from the county concerning shape and location of the new districts. Our evaluation of the redistricting plan nevertheless reveals that *the effect of the proposed district boundary lines is to fragment areas of black populations concentrations, thereby minimizing the total number of black persons residing in each of the districts* [2] *and diluting black voting strength in Warren County.*[3]

B. Litigation

On March 7, 1973, the United States invoked the jurisdiction of a three-judge court in the Southern Dis-

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[2] The plan as originally drafted was racially neutral, that is, without considering the racial characteristics of the county. On the basis of supplemental information requested by the Department, it was subsequently determined that one district had a 51% black population and another, 56.6%.

[3] Exhibit 6, p. 2, Intervenors First Request for Admission of Facts (Emphasis added.)

trict of Mississippi to enforce its objection. In a series of orders the court enjoined elections scheduled for 1975 as well as the use of the 1970 Plan or any other which had not been precleared under § 5. Finally, pursuant to the Department's suggestion, the county was ordered to submit new plans to the Department, and if preclearance were refused, the three-judge court would determine § 5 compliance and thereafter put into effect a court-ordered plan.

Two plans submitted to the Department by the Board received identical objections, to wit:

> [T]he effect of either plan is to fragment areas of black population and add those fragments to larger areas of white populations, thereby minimizing the number of blacks in each district, and thus unnecessarily diluting black voting strength . . . . Because these [district] lines do not appear to be drawn because of any compelling governmental need and do not respect population concentrations or considerations of the district compactness, [we object] . . . .[4]

Subsequently, in March, 1976, both sides filed plans with the court which, in light of an express finding of "substantial county responsibilities," limited its consideration to only those proposals in which all districts embraced both rural and county areas.[5] The court approved the county's proposal (Map 2) containing reasonably compact districts which extended into the county and produced one district with a 60% black

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[4] Exhibit 13, pp. 1-2, Intervenors First Request for Admission of Facts.

[5] See Appendix F at 32a n.1. This finding precluded review of one Department proposal having districts totally within the city of Vicksburg. *Id.*

population majority and two others at the 42% level. After concluding that the county's plan complied with *Beer* v. *United States,* 425 U.S. 130 (1976) (rendered after the plans at issue were drafted), the court responded to the Department's argument that the county's decision to extend all districts into the rural area in order to equalize road mileage was impermissible because its necessary effect was to preclude isolating voting districts where blacks were concentrated—the city of Vicksburg:

> The Government argues, however, that since road mileage has not been equalized in Warren County for approximately 50 years, it should not be a legitimate consideration. If this intends to urge that the errors of past officials in failing to seek equalization bind the present citizens by waiver or estoppel, it is not well taken. Any court apportionment plan should take into consideration every factor which will make county government in Warren County operate efficiently. The equalization of road mileage will substantially contribute to that efficiency since one of the major duties of the Board of Supervisors is to care for county roads.[6]

Having lost its arguments, the Department, joined by the intervenors represented by the Lawyers' Committee, reversed its position with respect to the authority of the Southern District court to preclear, and after securing a stay of elections ordered under the new plan, appealed to this Court. In the interim, intervenors filed *Thomas* v. *Warren County Board of Elections,* Civ. Act. No. W-76-45(N) (S.D.Miss. 1976), a suit alleging voter dilution under the Fourteenth and Fifteenth Amendments and seeking injunctive relief against fur-

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[6] *Id.* at 35a.

ther implementation of the court-ordered plan. This Court's reversal in *United States* v. *Board of Supervisors,* 429 U.S. 642 (1977), holding that only the District Court for the District of Columbia has jurisdiction to preclear, effectively terminated all litigation then pending in the Southern District of Mississippi. It also returned elected representatives of the county to square one with respect to their attempts to cure the defects of the 1929 Plan.

III. Litigation Before the Three-Judge Court for the District of Columbia

In light of *Beer,* CPI, on the advice of Board counsel, proceeded to develop a plan attuned to the racial characteristics of the county [7] and having two districts with substantial black majorities. The result, a proposal with one district having a 61% black population and another with 60.6%, was submitted to the lower court [8] on March 6, 1978, and is reproduced at Map 3. A statistical comparison of the 1978 Plan with the 1929 Plan (without considering the status of "other" ethnics) reveals the following:

	1929	
District	Population % Black	Population % Black (VAP)
1	39.6	36.4
2	64.0	60.2
3	50.7	45.9
4	55.9	50.5
5	17.3	16.2

[7] Prior to this time, CPI had not taken racial considerations into account in its preparation of redistricting proposals.

[8] Seven years of playing the shell game with attorneys representing the Department precluded any decision with respect to

1978 PROPOSED PLAN

District	Population % Black	Population % Black (VAP)
1	61.0	57.2
2	60.6	58.0
3	40.2	37.2
4	23.8	22.6
5	20.3	18.7

Suit was filed well over a year in advance of the 1979 general elections for a determination of what appellants perceived as the relatively straightforward issue of whether "upgrading" occurs when 60.6% and 61% districts are substituted for three having population percentages of 64, 55.9 and 50.7 or, on the basis of VAP, the substitution of two black majority districts of 57.2% and 58% for those in the 1929 Plan of 60.2% and 50.5%. Following a period of discovery in excess of fifteen months [9] the conflict was crystallized: the Department and the Lawyers' Committee demanded nothing less than two 65% districts and stood ready to introduce what they believed was sufficient political and socio-economic evidence to justify the concept of com-

administrative preclearance. Indeed, by the time the new plan was completed, the Department's conclusion that *Beer* required 65% districts had already been reached. *Compare* United Jewish Organizations v. Carey, 430 U.S. 144 (1977) *with* Map 4 ("settlement proposal" by the Department incorporating two 65% districts for Warren County).

[9] In addition to interrogatories, requests for admission and the like, over 1,800 pages of depositions were taken. Appellants, of course, utilized the period to gather evidence to defend the voter-dilution case they were sure would follow immediately upon the heels of a preclearance grant. See Thomas v. Warren County Board of Elections, *infra*, p. 8.

pensatory (as compared to protective) criteria for what was argued to be a proper construction of § 5.

Over strenuous objection by appellants against the reception of any evidence employed in constitutional, voter-dilution litigation as well as a refusal by the lower court to hear live testimony on the issues raised by appellees (all discovery served as the record), oral argument was held on July 3, 1979, almost a month after June 8, the time set under state law for candidates to qualify for party primaries. Twenty-eight days later, on July 31, the lower court issued its findings of fact and conclusions of law adopting—in total—appellees' factual and legal position.

IV. Chaos

As noted, the lower court's decision was handed down after the final date for qualifying for party primaries. On that day, June 8, the Lawyers' Committee qualified its clients as unopposed candidates for district office *under the 1929 Plan.* Prior to the lower court's denial of declaratory relief on July 31, appellants' motion requesting that it retain jurisdiction after rendering a final decision was denied.[10] Thus, once preclearance was denied, and having knowingly dealt with a covered jurisdiction placed in a state of suspended animation politically, the court left no impediment to prevent what was to be the most devastating and devisive segment of this interminable litigation.

Three days after the denial of declaratory relief, the Lawyers' Committee, reversing its 1976 position that

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[10] Similarly, a motion filed with the three-judge court in the Southern District of Mississippi seeking, among other things, a determination of the scope of its injunction issued to enjoin elections in 1975, was denied on jurisdictional grounds.

no election—even if court ordered—should be held under an election plan perceived as unconstitutional,[11] filed on behalf of its clients in the Warren County Circuit Court seeking mandamus to compel elections under the 1929 Plan. After this was denied (Appendix C), an omnibus motion was filed with the lower court seeking a mandatory injunction requiring the county to conduct elections under the 1929 Plan. Although that court, on August 23, denied the motion, it concluded:

> [A]n election *should* be conducted under the legally enforceable election procedures of 1929, pending preclearance to any new procedures.[12]

In the context of an election commission faced with the utter impossibility of conducting elections under a plan not used since 1967, and a community in political chaos (did "should" mean "must"?), suit was filed in the Southern District by voters seeking to have the 1929 Plan declared unconstitutional under the Fourteenth Amendment. On September 7, 1979, the court agreed and enjoined elections under the plan. Subsequently, it granted a motion to intervene filed on behalf of appellants but denied their request that the litigation be stayed pending review by this Court of the instant case. Thereafter, on September 29, 1979, it fulfilled its perceived constitutional duty and ordered special elections under what was termed a court-ordered "interim plan" placing one district totally within the city of Vicksburg and incorporating two with black populations at 65.3% and 67.06%. Facing the arguments by plaintiffs in that case that a 65% figure was

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[11] See p. 8, *infra*.

[12] Appendix B. (Emphasis added).

not mandated and that the ordering of any elections could result in mooting the instant appeal the court concluded:

> [The plan] also meets the racial standards declared by the United States District Court for the District of Columbia in *Donnell* v. *United States*. Compliance with the *Donnell* standard implies no judgment by this court that the adoption of that standard was correct. It is adopted here solely because this court considers it unseemly to deviate from that declaration for the limited purposes of the interim plan for this special election. The adoption of this plan is without prejudice to the rights of any party in *Donnell* v. *United States* to pursue that action to finality. If any incumbent supervisor presently a plaintiff in *Donnell* v. *United States* is not reelected in the special election held under this order, he shall nevertheless be entitled to exercise the prerogatives of his former office for the sole purpose of pursuing that litigation to its proper conclusion in behalf of Warren County and at county expense. [Appendix E at 26-7a]

THE QUESTIONS ARE SUBSTANTIAL

I. Conflict with *Beer*

Interspersed with the lower court's findings of fact are certain factors critical to the determination that percentage floors (65% population; 60% VAP) are necessary to provide black voters "with an opportunity to elect a candidate of their choice." [13] These include: a low level of black-voter registration; [14] a review of the low socio-economic position of blacks in

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[13] Appendix A at 9a (par. 37).

[14] *Id.* at 3a (par. 8).

the county, *i.e.*, income, education and employment;[15] a history of discrimination "causing a lesser participation by blacks than whites in the political process";[16] bloc voting;[17] and the fact that no blacks have previously been elected to district office.[18] Presumably armed with the legal authority generated by these factors, the lower court proceeded to scrutinize closely the district lines found in the submission in order to make the following determinations:

(1) That, in addition to incorporating districts that were "not compact," the plan utilized "irregular boundaries" throughout the city of Vicksburg;[19]

(2) That the twenty majority-black census enumeration districts are divided among four of the proposed districts;[20]

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[15] *Id.* (par. 9).

[16] *Id.* at 8a (par. 33). The only evidence cited which bears on the issue are Mississippi statutes and *suits against the state* in the 1960's, *i.e.*, guilt by association. Compare Bolden v. City of Mobile, No. 77-1844 (detailed fact finding in constitutional case).

[17] Appendix A at 9a (pars. 35-6). The appellees' witness on this issue (as well as the 65% business) is Dr. James Loewen, a sociologist who, at $310 per day, is an appendage of the Department. Probable jurisdiction has now been noted in one case in which he played a key role, Rome v. United States, No. 78-1840. On September 25 the Solicitor General filed a jurisdictional statement in United States v. Mississippi, No. 79-504, the state reapportionment suit in which Dr. Loewen was also used as an expert with respect to statewide criteria. If the records in the two cases are reviewed as one, *i.e.*, for purposes of plenary review, it will reveal that appellees in the *Mississippi* case argue that Warren County should be excluded from the 65% requirement while, at the same time, seek to distinguish their position in the instant litigation. See *id.* at 16-7. Accord, Jurisdictional Statement at 17-8, Henry v. Mississippi, No. 79-528.

[18] Appendix A at 8a (par. 34).

[19] *Id.* at 6a (par. 23).

[20] *Id.* (par. 24).

(3) That appellants were aware that the proposed plan divided black population concentrations;[21]

(4) That no "valid nonracial justification" existed for a plan which the court found to "fragment the black community and cause a diminution in black voting strength";[22]

(5) That there had been no showing "that alternative plans [did] not exist which would achieve the same objective and which do not divide black population concentrations . . . ."[23] and

(6) That, in light of the current socio-economic position of blacks, a past history of discrimination, bloc voting, etc., the professional employed to draft the plan was charged with a responsibility to consider "the black population percentage required in a district [65%] to give black citizens *an equal chance* of electing a candidate of their choice."[24]

When packaged, the lower court opinion is nothing less than a major victory for the appellees: *Beer* v. *United States* has been applied (this time in Warren County) and won. Indeed, the parallel between what

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[21] *Id.* at 6a (par. 25). These conclusions dovetail with yet another: irregular shape has a discriminatory effect inasmuch as "black candidates and voters [will suffer] . . . increased campaign costs and confusion." *Id.* at 10a (par. 39).

[22] *Id.* at 10a (par. 41).

[23] *Id.* at 8a (par. 31). The Department and the Lawyers' Committee, although tediously adhering to arguments concerning the shape of the 1978 Plan, have no qualms over the propriety of their own unique configurations which—in turn—generate the 65% level. See, *e.g.*, Map 4 for the "alternative plan" proposed by the Department.

[24] Appendix A at 8a (par. 32). (Emphasis added.)

occurred in *Beer* and what has happened in the instant case is nothing short of incredible.

Employing language essentially identical to that utilized by the Department [25] and adopted by the court below, the Attorney General wrote the following in a letter to New Orleans:

> the boundary lines . . . effect *a dilution of black voting strength* [in that they] combine a number of black voters with a large number of white voters . . . . Moreover, the district lines . . . do not appear to have been based on *a compelling governmental need or to reflect numeric population configurations or considerations of district compactness or regularity of shape.*[26]

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[25] See notes 3-4 and accompanying text, *supra.*

[26] Beer v. United States, 374 F.Supp. 363, 371 n.33 (1974) (Emphasis added.) The approach taken in *Beer* and in the instant case has a long history. Between 1971 and 1975 the Attorney General interposed objections to 51 different redistricting plans in six states. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 402-09 (1975). See also, HUNTER, FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT 90-97 (1974). In objecting to these plans, the Attorney General employed the following standard: district lines must not be drawn in such a way as to divide up a concentration of minority voters and submerge fragments of that concentration in districts with larger numbers of white voters. See TEN YEARS AFTER, *supra,* at 204-49.

The most recent instance was the Department's strict adherence to the "fragmentation" and "dilution" approach in its unsuccessful attack on the redistricting plan proposed by the state of Mississippi. See, *e.g.,* United States, Proposed Conclusions of Law 21, 23, Mississippi v. United States, Civ. Act. No. 78-1425 (districting scheme that "fragments" blacks into white districts violates § 5); *Accord, Id.,* Defendant-Intervenors, Proposed Conclusions of Law at 40 (identical "fragmentation" and "dilution" argument). *Compare* Jurisdictional Statement at 25, United States v. Mississippi, No. 79-504, *with,* Appendix A at 12a (Par. 11) for

Adopting the "compelling interest" approach espoused by the Department, the district court in *Beer* (as did the court below) concluded that the burden on a submitting authority is "at least to demonstrate that nothing but the redistricting proposed" is feasible if a colorable claim of black voter "dilution" is made.[27] Put another way:

> In light of the purposes and legislative history of Section 5 [submitting authorities are] required to establish either that there was no concentration of black voters . . . or that such concentration or concentrations had not been divided among predominantly white districts.[28]

In reaching its conclusion that the New Orleans submission did not pass muster under § 5, the District of Columbia court employed a sweeping constitutional analysis, *i.e.*, total incorporation into § 5 of constitutional, voter-dilution criteria as enunciated in *White* v. *Regester*, 412 U.S. 755 (1973).[29] As such, findings re-

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the proposition that when districts drawn in a manner to meet *Beer* do not concentrate black populations, a discriminatory purpose may be inferred. Similar arguments were made before this Court in *Beer* and rejected, *i.e.*, a remand of the case resulted in no further evidence being taken on the issue prior to dismissal.

[27] 374 F.Supp. at 393. In the New Orleans litigation there were, of course, alternative plans available which would not tend to "dilute" black voters. What was referred to as the "Republican Plan" would have resulted in two districts with black majorities in excess of 60%.See Brief for Appellees-Intervenors, Beer v. United States, 425 U.S. 130 [hereinafter referred to as *Beer* II] at 18. In addition, the NAACP provided a plan which would have produced a 90% district. See *Beer* II, Appendix at 341-42.

[28] Brief for Appellees-Intervenors, *Beer* II at 13 (explaining the impact of the district court's holding).

[29] The status of which is now, at best, questionable. Bolden v. City of Mobile, 571 F.2d 230 (5th Cir. 1978), *prob. jur. noted,*

lated to a past history of discrimination in the voting process,[30] unrelated governmentally-sanctioned discrimination,[31] low registration of minority voters,[32] historic inability to elect minority candidates,[33] unresponsiveness on the part of elected officials to minorities,[34] majority vote, anti-singleshot and bloc voting,[35] were deemed critical ingredients (as they were to the court below) in a determination as to whether § 5 standards were met.

On appeal, Intervenors pointed to what they considered to be a scenario in which blacks in New Orleans had been "systematically dismember[ed]" [36] to wit:

> The [lower court] found that black voters were concentrated in a [sic] east-west belt . . . that that concentration was divided among five different districts and combined with larger numbers of white voters, and the bloc voting by whites rendered unlikely if not impossible the election of black candidates from at least four of the districts.[37]
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> . . . .

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47 U.S.L.W. 3221 (U.S. Oct. 10, 1978), *re-argument ordered*, 47 U.S.L.W. 3741 (U.S. May 1, 1979). The importance of the instant case in light of the Court's review in *Mobile* cannot be underestimated. Expensive and time-consuming constitutional litigation becomes irrelevant if § 5 can be employed (without the need to present live testimony) to reach an identical goal, *i.e.*, forced concentrations of black voting power.

[30] 374 F.Supp. at 395-96.

[31] *Id.*

[32] *Id.* at 397.

[33] *Id.* at 398.

[34] *Id.*

[35] *Id.* at 398-99.

[36] Brief for Appelees-Intervenors, *Beer* II at 17.

[37] *Id.* at 14.

> . . . . Had the district lines been drawn to reflect natural and man-made boundaries which separate the black concentrations from the rest of the city or had the districts merely been reasonably compact, two or more districts with a substantial majority of black voters would have resulted.[38]
>
> . . . .
>
> . . . . [I]t would be difficult to design a districting plan better suited to avoiding a substantial black majority in any one district and thus preventing the election of black candidates.[39]

Paralleling the presentation by Intervenors, the United States canvassed the opinion of the District Court with approval.[40] Arguing that an "unconstitutional dilution" occurs when blacks with "common social and economic interests are divided," [41] the brief supported a full constitutional analysis because

> [a]ny lesser standard for granting a declaratory judgment under Section 5 would permit approval of new election procedures under that section *which would be vulnerable to subsequent challenge under the Fifteenth Amendment—a result obviously contrary to the propylactic purposes of Section 5.*[42]

This Court's approach was, of course, at variance with the District Court's analysis and the arguments made in its support. Noting that the case presented a clear question of statutory, not constitutional law, 425 U.S. at 139, and that § 5's legislative history focused on

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[38] *Id.* at 18.

[39] *Id.* at 20.

[40] Brief for the United States, *Beer* II at 8-9, 15-18, 20-21.

[41] *Id.* at 28.

[42] *Id.* at 18. (Emphasis added.)

the issue of whether minority participation in the political process was "augmented, diminished, or not affected", *id.* at 141, by voting changes, the conclusion followed that:

> [i]n other words, the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. [*Id.*]

The application of this legal conclusion to the facts was determined to be "straightforward," *i.e.,* a comparison of percentage population and registered-voter figures presented by the "old" and "new" plans in order to make the determination as to whether black voting strength had been enhanced.[43]

Thus, *Beer* stands for the proposition that neither a § 5 court nor the Department of Justice (in administrative preclearance proceedings) has the authority to examine the entire social, economic and political environment of a covered jurisdiction or to scrutinize submissions to ferret out "fragmentation and dilution" of black population concentrations. Even more important, there is nothing in *Beer* which commands that professionals drafting redistricting plans be knowledgeable of those percentages required to give blacks an "equal chance of electing a candidate of their choice" in a par-

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[43] *Id.* at 141-42. "This test [non-retrogression] was satisfied in *Beer* where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority." United Jewish Organizations v. Carey, 430 U.S. 144, 159 (1977). *UJO* also established the proposition that § 5 does not have a "prophylatic purpose" and that a constitutional challenge can be made after preclearance.

ticular district nor which permits a § 5 court to conclude that the non-retrogression standard may be equated with current voter-dilution criteria in order to support a judicial fiat that 65% population or 60% VAP's *are required* "to provide black voters with an opportunity to elect a candidate of their choice." The lower-court decision is at war with *Beer* and thus demands plenary consideration by this Court.[44]

II. The Plan

Beer presented this Court with its first opportunity to construe § 5 in the context of an alteration of single-member districts. The test enunciated was deemed satisfied when the reapportionment increased the percentage of districts where members of a racial minority were in the majority. In his dissent, however, Mr. Justice Marshall forewarned that the standard may not always be that easy to apply. As an example he noted that when the size of the majority increases in one district, black voting strength necessarily declines elsewhere.[45] The instant case presents a similar question that finds no clear answer in *Beer*.

First, unlike *Beer*, this case involves a redistricting scheme *totally unrelated* to that which it is intended to supercede. Specifically, eradication of city districts is deemed fundamental to improving the day-to-day functioning of county government. Thus, in drafting the proposed 1978 Plan, the professional employed ini-

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[44] Needless to say, the lower-court's approach is also flatly contrary to the teachings of United Jewish Organizations v. Carey, 430 U.S. 144 (1977), *i.e.*, it is for the State to determine (if it so desires), not the Department of Justice or a § 5 court, what percentage figures are necessary "to ensure the opportunity for the election" of black representatives. *Id.* at 162.

[45] 425 U.S. at 153 n.12. (Marshall, J., dissenting).

tially divided up the county's rural area into five segments designed to equalize road mileage and bridge-maintenance responsibilities. Thereafter, and taking the populations and racial percentages of these districts as given, lines were drawn into the city of Vicksburg in such a manner as to: (1) generate population percentages meeting one-man-one-vote criteria; and (2) contain racial characteristics sufficient to meet the non-retrogression standard of *Beer*. The statistical result of his work, when compared with the 1929 Plan, is easily analyzed.

Under the 1929 Plan, black population percentages in the three severely underpopulated city districts (ranging from 6,217 to 7,500), were 64%, 50% and 56%, whereas the 1978 Plan (with all districts at or near 9,000) produced two 60% districts. As for VAP, the 1929 Plan had two black-majority districts, one with 60.2% and the other with 50.5% in contrast to the 1978 proposal which contains one 57.2% district and another at 58%. The issue, therefore, is not an increase of black-majority districts as in *Beer*. What is involved is an overall upgrading in black voting strength *albeit* the percentage level previously attained (in one district) has been reduced. Indeed, the fact that preclearance of the instant plan was denied by the lower court when a previous three-judge § 5 court (without jurisdiction) concluded that *Beer* had been complied with under a plan with one 60% district and two at the 40% level [46] demonstrates that the case presents an impor-

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[46] See Appendix F at 34a. The three-judge Mississippi court's analysis of the legitimate governmental objectives incorporated into a plan which equalizes road mileage, etc., was also implicitly rejected by the court below. See App. A, pars. 13, 14, 22, 27, 28, 29. As in *Beer*, and all cases of this sort, CPI drafted plans in a manner to insure that dual incumbancy did not occur.

tant issue of statutory construction unresolved by existing precedent. This issue, in and of itself, warrants plenary consideration by the Court.

III. Retention of Jurisdiction

City of Petersburg v. United States, 354 F. Supp. 1021, 1031 (D.D.C.), *aff'd,* 410 U.S. 962 (1973), established the proposition that after preclearance is denied, a § 5 court may *retain jurisdiction* in order to insure that compliance is forthcoming. Prior to July 31, and in light of the fact that a denial of preclearance would leave county government as well as the status of regularly-scheduled elections [47] in a state of total confusion, appellants requested that the lower court's discretion be employed, that is, retaining jurisdiction, requiring submission of a plan complying with the court's decision, and thereafter implementing court-ordered elections.[48] The decision not to grant the motion resulted in a frontal assault by intervenors to force elections under an obviously unconstitutional plan which, in light of steps taken in 1976 to enjoin court ordered elections,[49] could only have been the result of one, singular motivating factor. Specifically, as a beneficiary of the fortuitous fact that a denial of declaratory relief came at the exact time frame elections were regularly scheduled, by forcing elections under any plan (even if unconstitutional) new officials could be elected who would have no

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[47] The "freeze" issue is now before the Court. Rome v. United States, 78-1840.

[48] Inasmuch as the three-judge court for the Southern District had continuing jurisdiction, that entity may have also served as a proper vehicle for ordering elections, *i.e.,* submission of a precleared plan requesting that a schedule for elections be developed.

[49] See p. 8, *infra.*

interest in the plan now before this Court inasmuch as the proposed districts have no relationship with those from which they would be elected. The result: a directive to terminate the instant appeal by the newly-elected officials and resulting mootness.

Thus, county government was subjected to a fifty day period of intensive litigation in state and federal court which only terminated on September 20 with an injunction issued against the 1929 Plan and the development of an "interim" plan for court-ordered elections by the Southern District of Mississippi. All this naturally flowed from the lower court's refusal to retain jurisdiction at a time when the following critical factors were known to the panel:

(1) That other than the 1929 Plan (not used since 1967 and which was obviously unconstitutional), the county had no viable redistricting format under which candidates could run;

(2) That because of the pending case (filed a year and five months previous) the county's election machinery was effectively frozen and the political community was and had been placed on notice of that fact;

(3) That in light of intervenors' express intent to try to force elections under the 1929 Plan there was no question that the county would be placed in political turmoil far more devisive than the polarizing consequences which the litigation had already had on the community;

(4) That appellants' motion for the court to retain jurisdiction and require an immediate submission of a plan conforming to its construction of § 5 was a good-faith attempt to invoke its equitable powers.

What has occurred in this one instance [50] clearly focuses on a question never presented to this Court and which is critical to a proper functioning of § 5: under what circumstances should a § 5 court exercise its equitable discretion in order to expedite preclearance proceedings?

CONCLUSION

What has happened to Warren County is symptomatic of activity by Department lawyers in all covered jurisdictions. For example, attached to Appellants' Motion for Expedited Consideration is a recent editorial from the Wall Street Journal commenting on the fact that elections have been frozen by the Department in Houston and Dallas. The analysis alludes to the exact issue raised by Warren County:

> Since [1975, § 5's] enforcement has gone far beyond an attack on the shabby history of black disenfranchisement to become an "affirmative action" program. . . . The Justice Department has been devoting itself to maximizing the number of minority officeholders, no matter what.

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[50] The advent of the 1980 census coupled with the posture now assumed by the Voting Rights Section towards covered jurisdictions, i.e., promoting rather than protecting black voting rights, would indicate that the District of Columbia court can expect a dramatic increase of § 5 filings.

This Court's decision in *Beer* has had little or no effect on Department policy. The importance of the issues are clear, and appellants respectfully request that this Court note probable jurisdiction and set the case for plenary hearing at the earliest possible time.

Respectfully submitted,

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October, 1979

APPENDIX A

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0392

CLYDE R. DONNELL, *et al, Plaintiffs*

v.

UNITED STATES OF AMERICA and GRIFFIN BELL,
Attorney General, *Defendants*

and

EDDIE THOMAS, SR., et al, *Defendant-Intervenors*

Order

Filed July 31, 1979

After careful consideration of the affidavits, exhibits and deposition testimony submitted in this case, the oral arguments of counsel and the entire record herein, and the three-judge court having concluded that plaintiffs have not carried their burden of demonstrating that the proposed redistricting plan does not have the purpose or effect of discriminating on the basis of race, it is by the Court this 31st day of July 1979,

ORDERED that plaintiffs' motion for a declaratory judgment pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1937(c) is hereby denied.

JUDGE ROGER ROBB
JUDGE THOMAS A. FLANNERY

By /s/ JUDGE JUNE L. GREEN
Judge June L. Green
For the Court

[Caption deleted in printing]

This voting rights case came before the Court for oral argument on July 3, 1979. After careful consideration of the submissions of the parties, the oral arguments of counsel at the hearing of this matter, and the entire record herein, the Court concludes that plaintiffs' request for declaratory judgment pursuant to Section 5 must be denied.

Findings of Fact

1. This action was brought by the members of the Warren County Board of Supervisors pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaratory judgment that the proposed 1978 redistricting plan for county supervisor districts does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

2. Warren County is located in the west central area of the State of Mississippi bordering the Mississippi River. Like all counties in Mississippi, Warren County is divided into five districts for purposes of electing the County Board of Supervisors.

3. The supervisor districts are single-member districts and thus the voters of each district elect one member of the five-member board. In addition, supervisors must be residents of the district which they represent.

4. The Warren County Board of Supervisors has responsibility for establishing the boundaries of the five-county supervisor districts.

5. In 1970, Warren County had a total population of 44,981, of whom 18,355 (40.80%) were black, and a total voting age population of 27,719, of whom 10,574 (38.15%) were black.

6. Vicksburg, Mississippi is the largest city in Warren County. In 1970, Vicksburg, Mississippi had a total popu-

lation of 25,478 of whom 12,568 (49.33%) were black, and a total voting age population of 16,567, of whom 7,483 (45.17%) were black.

7. According to records currently maintained by the Warren County Board of Election Commissioners, the total number of registered voters in the county as of May 6, 1978 was 26,663. The record does not contain the number of registered voters by race as of 1978.

8. As of 1971, the county did maintain registration records which designated the race of most registered voters. Those records show that as of 1971, 58.8% of the registered voters were white and 27.8% were black; the registration cards of the remaining voters (13.4%) did not contain a racial identification.

9. As reflected in 1970 census data, the socio-economic position of blacks in Warren County is substantially lower than white residents. White persons in Warren County have a median income of $9,782.00 while the median income of black persons is $3,794.00; 49% of the black residents have an annual income below the poverty line. The median formal education among black adults (25 years and older) in the county is 7.0 years for males and 8.4 for females. This compares with the median education among white adults which is 10.4 years for males and 10.2 years for females. Finally, 82.0% of blacks are employed in blue collar positions as opposed to 39.8% of white persons in the county.

10. According to the 1970 census, the black population of Warren County is most heavily concentrated in the twenty majority black census enumeration districts in central and north Vicksburg and north of Vicksburg in the rural area. This area includes 68% of the total black population of Warren County and is 71% black in racial composition.

11. The only legally enforceable plan of apportionment for county supervisor elections in Warren County is a plan which was adopted in 1929. Under that plan three of the supervisor districts are located entirely within the City of Vicksburg and the remaining two districts are located in the rural areas of the county. *See* Map, Appendix 1.

12. Under the 1929 plan, the total population and voting age population for each of the five districts are as follows:

Total Population

District	White	Nonwhite	Total	Percent W	Percent NW
1	5934	3893	9827	60.4	39.6
2	2717	4849	7566	36.0	64.0
3	3066	3151	6217	49.3	50.7
4	3321	4218	7539	44.1	55.9
5	11436	2396	13832	82.7	17.3
TOTAL	26474	18507	44981	58.9	41.1

Voting Age Population

District	White	Nonwhite	Total	Percent W	Percent NW
1	3691	2112	5803	63.6	36.4
2	1958	2958	4916	39.8	60.2
3	2318	1965	4283	54.1	45.9
4	2353	2396	4749	49.5	50.5
5	6676	1292	7968	83.8	16.2
TOTAL	16996	10723	27719	61.3	38.7

13. From 1929 to 1970, no changes were made in the boundary lines of supervisor districts and no adjustments were made to equalize population or road mileage among the districts.

14. On November 4, 1970 the Board of Supervisors of Warren County adopted a reapportionment plan for the five supervisor election districts. Unlike the plan in effect

from 1929 to 1970, the 1970 plan had no districts located exclusively within the City of Vicksburg. Rather, each of the five districts encompassed rural county areas as well as a portion of the City of Vicksburg.

15. The 1970 plan was submitted to the Attorney General on November 25, 1970 for review pursuant to Section 5 of the Voting Rights Act of 1965.

16. After obtaining additional population information from Warren County, the Attorney General interposed a timely objection to the proposed plan, pursuant to Section 5, on April 4, 1971.

17. The Attorney General declined to withdraw the objection on August 23, 1971 but the Board held primary and general elections in August and November of 1971, pursuant to the 1970 plan, in spite of the objection by the Attorney General.

18. On October 31, 1973 the Department of Justice filed suit to enjoin the continued use of the 1970 redistricting plan since the plan had been implemented without preclearance under Section 5 of the Voting Rights Act. *United States v. Board of Supervisors of Warren County, Mississippi,* Civil Action No. 73W-48(N) (S.D. Miss.). On June 19, 1975 the three-judge court granted summary judgment in favor of the United States and the 1975 county elections scheduled for August and November were enjoined.

19. Pursuant to the court's order of July 1, 1975 the parties to *United States v. Board of Supervisors of Warren County* filed proposed apportionment plans with the court and on May 13, 1976 the court ordered the county's proposed redistricting plan into effect and established a schedule for county elections.

20. An appeal was taken by the United States and, on February 22, 1977 the United States Supreme Court reversed the judgment of the District Court holding that "only the District Court for the District of Columbia has

jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race and that other district courts may consider Section 5 'coverage' questions." *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645 (1977).

21. Following the decision by the Supreme Court the Board of Supervisors through its agent Comprehensive Planners, Inc., of West Point, Mississippi drafted the redistricting plan for Warren County presently before this court for Section 5 review.

22. Unlike the districts under the 1929 plan each of the five districts under the proposed plan divides the City of Vicksburg and encompasses an urban area and a rural area.

23. The districts in the proposed 1978 plan are not compact and follow irregular boundaries through the City of Vicksburg. The northern portion of District 4 is noncontiguous to the remainder of the district; these two portions of the district are connected only by a river bed. *See* Map, Appendix 2.

24. Under the Board of Supervisors' proposed 1978 plan the area encompassed by the twenty majority black census enumeration districts within Warren County is divided among four of the five proposed supervisor districts. In one portion of the plan a one-block area where blacks reside is divided among three districts.

25. Members of the Warren County Board of Supervisors were aware that the proposed 1978 plan divided the black population concentrations within the City of Vicksburg and that the districts as drawn are neither compact nor continguous.

26. Under the proposed 1978 plan, the general population and voting age population for each of the five districts are as follows:

Total Population

White	Nonwhite	Total	Percent W	Percent NW
3509	5494	9003	39.6	61.0
3547	5458	9005	39.4	60.6
5331	3577	8908	58.8	40.2
6904	2152	9056	76.2	23.8
7183	1826	9009	79.7	20.3

Voting Age Population

White	Nonwhite	Total	Percent W	Percent NW
2396	3199	5595	42.8	57.2
2302	3182	5484	42.0	58.0
3412	2018	5430	62.8	37.2
4505	1318	5823	77.4	22.6
4381	1006	5387	81.3	18.7
16996	10723	27719	61.3	38.7

27. The three stated criteria which allegedly guided the drafting of the 1978 proposed plan included: equalization of road and bridge maintenance, equalization of population, and retention of presently existing election districts and availability of voting places.

28. The criteria of equalization of road and bridge maintenance had not been utilized by the Board of Supervisors from 1929 to 1970.

29. The county has no responsibility for road and bridge maintenance in the City of Vicksburg. Therefore equalization of road and bridge maintenance is not a justification for the proposed district lines within the City of Vicksburg.

30. Under the proposed plan no former election precinct within the City of Vicksburg is left intact.

31. Although the 1978 proposed plan achieves the stated objective of equalization of population among the five districts, the plaintiffs have failed to show that alternative plans do not exist which would achieve the same objective and which do not divide black population concentrations within the City of Vicksburg nor reduce black voting strength from the level of the 1929 plan.

32. Mr. Hoyt Holland, the drafter of the 1978 proposed plan, testified that an objective of the plan was to obtain two "substantial" black districts. Mr. Holland was unable to explain what he meant by substantial, and further testified that he was unaware of, and did not consider, the black population precentage required in a district to give black citizens an equal chance of electing a candidate of their choice.

33. Mississippi and Warren County have in the past used such devices as the literacy test, poll tax, and white primary to exclude black citizens from participation in the electoral process. Until passage of the Voting Rights Act of 1965, the use of these racially discriminatory devices effectively excluded black persons in Mississippi and Warren County from exercise of the franchise. Miss. Const. Art. 12, 3244, and as subsequently amended, Miss. Laws, 1954, Ch. 427; Miss. Laws, 1955, Ex. Sess., Ch. 133; *United States v. State of Mississippi,* 229 F. Supp. 952, 989 (S.D. Miss. 1964), (Brown, J. *dissenting*); *United States v. State of Mississippi,* Civil Action No. 3791 (S.D. Miss. 1965); *United States v. State of Mississippi,* Civil Action No. 3312 (S.D. Miss. 1966). Warren County's past history of racial discrimination in voting continues to affect black persons in the county causing a lesser participation by blacks than whites in the political process.

34. Black candidates from Warren County have run for almost all major offices on the county and state level since 1968. Although 40.80% of the population in Warren County is black no black person has ever been elected to a county position.

35. Testimony of expert witnesses and knowledgeable citizens demonstrates that racial bloc voting has consistently prevailed in Warren County and throughout the state of Mississippi.

36. The most recent example of racial bloc voting in a Warren County election took place during a special election in January 1979 for the Mississippi House of Representatives, District 30B. This special election was ordered by the District Court for the Southern District of Mississippi in *Connor, et al, & United States v. Finch,* Civil Action No. 3830(A), and was conducted in a district comprised of six precincts in Warren County with a 59.28% total black population. Although initially receiving a plurality of the votes cast the black candidate, Eddie Thomas Sr., lost to the white candidate in the runoff. Thomas' support came almost exclusively from the Walters and Auditorium precincts, which are predominantly black, while his white opponent carried the remaining precincts by nearly a two-to-one margin.

37. Racial bloc voting combined with Warren County's past history of discrimination and resulting low black voter registration and turnout for elections make it necessary for an electoral district in Warren County to contain a substantial majority of black eligible voters in order to provide black voters with an equal chance to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

38. Blacks constitute 60% of the voting age population in one district under the 1929 plan and that is the minimum percentage at which black citizens have an equal chance to elect a candidate of their choice. Under the proposed plan no district has a voting age population greater than 58% black and thus, under the proposed plan, it is unlikely that

black citizens will be able to elect a candidate of their choice in any of the districts.

39. The irregularly shaped districts within the city under the proposed 1978 plan will discriminatorily affect black candidates and voters in terms of increased campaign costs and confusion over district boundaries and polling places.

40. Plaintiffs have failed to demonstrate on this record that the proposed plan would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

41. Plaintiffs have offered no valid nonracial justification for the district lines within the City of Vicksburg which result in irregular shaped districts, fragment the black community and cause a diminution in black voting strength.

Conclusions of Law

1. This court has jurisdiction to hear and determine this case. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

2. This court has been properly convened as a court of three judges. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

3. Warren County and the State of Mississippi are subject to the preclearance requirements of Section 5. 30 *Fed. Reg.* 9897 (August 7, 1965).

4. Under Section 5, Warren County, Mississippi may not enforce or implement any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" unless such change has either been precleared by the Attorney General, or unless Warren County obtains a declaratory judgment in the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

5. The proposed 1978 redistricting plan enacted by the Warren County Board of Supervisors will occasion voting changes subject to the preclearance requirements of Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c; *Georgia v. United States,* 411 U.S. 526, 531-35 (1973); *Beer v. United States,* 425 U.S. 130, 138 (1976).

6. In an action for declaratory judgment under Section 5, the burden of proof is on the plaintiff. *Georgia v. United States,* 411 U.S. 526, 538 (1973); *South Carolina v. Katzenbach,* 383 U.S. 301, 328 (1966).

7. Plaintiffs' burden in this suit for declaratory relief under Section 5 is to demonstrate that the proposed 1978 redistricting plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c; *Beer v. United States,* 425 U.S. 130 (1976); *City of Richmond v. United States,* 422 U.S. 358 (1975).

8. Unless the absence of both discriminatory purpose and discriminatory effect is shown, plaintiffs' request for declaratory judgment must be denied. 42 U.S.C. § 1973c; *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973).

9. In order to prove the absence of discriminatory effect, plaintiffs must show that the voting change at issue would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer v. United States,* 425 U.S. 130, 141 (1976); *State of Mississippi v. United States,* Civil Action No. 78-1425 (June 1, 1979, D.D.C.), Conclusions of Law No. 10.

10. Plaintiffs have failed to show that the proposed plan will not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise and thus have failed to show the absence of discriminatory effect under the proposed 1978 plan. Therefore, plaintiffs' request for declaratory judgment

must be denied. Findings of Fact No. 23-25, 34-40; *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *Beer v. United States,* 425 U.S. 130 (1976).

11. Plaintiffs have failed to offer any justification for the diminution of black voting strength under the proposed plan nor the grossly irregular proposed district boundaries in the City of Vicksburg which fragment black residential areas. Thus, plaintiffs have failed to demonstrate the absence of discriminatory purpose. Findings of Fact No. 23-25, 29-31, 34-38, 40; *City of Richmond v. United States,* 422 U.S. 358 (1975); *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *Beer v. United States,* 425 U.S. 130 (1976).

12. Plaintiffs' request for declaratory judgment pursuant to Section 5 of the Voting Rights Act is denied. *Beer v. United States,* 425 U.S. 130 (1976); *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *City of Richmond v. United States,* 422 U.S. 358 (1975); *State of Mississippi v. United States,* Civil Action No. 78-1425 (June 1, 1979, D.D.C.).

/s/ ROGER ROBB
Roger Robb, Circuit Judge,
United States Court of Appeals
for the District of Columbia Circuit

/s/ JUNE L. GREEN
June L. Green, Judge
United States District Court
for the District of Columbia

/s/ THOMAS A. FLANNERY
Thomas A. Flannery, Judge
United States District Court
for the District of Columbia

APPENDIX B

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-392

CLYDE R. DONNELL, et al, *Plaintiffs*

v.

UNITED STATES OF AMERICA, et al, *Defendants*

and

EDDIE THOMAS, SR., et al, *Defendant-Intervenors*

Order

Filed August 23, 1979

Upon consideration of Intervenors' motion for clarification and for declaratory and injunctive relief, the Court declares with respect to Finding No. 11 of the Findings of Fact entered herein on July 31, 1979, that the filing of a section 5 declaratory judgment law suit did not have the effect of "freezing" the election process and that an election should be conducted under the legally enforceable election procedures of 1929, pending preclearance of any new procedures. In all other respects, the Intervenors' motion is denied.

/s/ ROGER ROBB
Roger Robb
U.S. Circuit Judge

/s/ JUNE L. GREEN
June L. Green
U.S. District Judge

/s/ THOMAS A. FLANNERY
Thomas A. Flannery
U.S. District Judge

APPENDIX C

APPENDIX "C"

August 3, 1979

RE: HEARING ON PETITION FOR WRIT OF MANDAMUS IN THE CIRCUIT COURT OF WARREN COUNTY

Judge's Ruling

THE COURT: We are into a position, or a situation, a sort of political fiasco. And, of course, the real loser in this matter is the electorate of Warren County, who's being deprived of their constitutional right, and, as counsel has said, of their privelege to elect officers of their choice. It's really a sad day when the electorate gets caught up in a battle here between—well, we won't say private persons, but public and private persons. Seemingly the rights of the electorate have just been ignored.

They're in Washington and other federal courts, fighting over percentages—three or four or five percent in this district, or it ought to be three or four or five percent more in this district. They're thinking more about the individual rights, I suppose, of the litigants involved than we are about the public in general. Of course this is a matter that has been tossed around and talked about and considered by the community at large. And judges, as well as citizens, can hear what the talk is around the community. And the community wants the right to vote regardless of who they vote for.

Here I see gentlemen who are presently in office; they may be in there on the next vote, or they may not. Who knows? That's according to the whims of the electorate. But there needs to be something done about this matter. Now it occurs to me that it's late in the day for these petitioners now to, after seeking federal relief and after fighting their battles in the federal courts for the last four or five years, and then to seek to get the State court here,

this court, to pull the chestnuts out of the fire. I just think it's a little late in the day, and it comes too late. And in addition to that, I'm not too sure that this court's hands are tied while these matters are pending in the federal court.

Now just an aside and a suggestion of what I think might could be done—but what I think, it may be something that the other court might not think. But it seems to me that the federal court ought to realize the plight of this County, and it ought to be brought into focus some way by counsel for both sides in this litigation, and give the federal court an opportunity to perhaps appoint its own master, as it does in cases. They have a right to appoint a master to look into things, and let the master devise a plan that's going to be satisfactory to the federal court and to the Attorney General of the United States and the Justice Department. And that's what it looks like. Now to keep on going, this thing could be interminable. Warren County could employ another one of these comprehensive planners out of Dallas or Tishomingo or Indianapolis. They can come down here and devise what they think is a pretty solid plan and try to piece it out geographically and otherwise. And yet, who's to say but what we get into the same litigation and same difficulty on any plan that's submitted.

So the only thing I see to do, the federal court is the one, apparently who has the last say about it, and they write in here this plan is unacceptable. Seems to me, in the interest of justice and these people here, and these litigants, that they should appoint their own master as they call it, or comprehensive planner, and get one that's satisfactory to the court and get things moving here toward our right to franchise again.

As I say, evoking [sic] the aid of this court at this late date and, also, with the matter still in a pending situation before the federal court, I would not be inclined to entertain this petition for mandamus and, therefore, the petition for writ of mandamus will be dismissed.

I will ask counsel for the respondents in the case to prepare an order for dismissal of the petition.

* * * *

[Court Reporter's Certificate deleted in printing]

APPENDIX D

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J79-0425(c)

Herbert C. Stokes, Jr., Doris Erwin Sanders, Rembert C. Webb, Jr., William Sheffield, Paul Sheffield, and Marshall E. Calhoun, *Plaintiffs*

vs.

Warren County Election Commission, Mary Nancy Burkhardt, Chairman, Challie Turnstall, Lena Corbin, Lucille Lovett, Clint Whitaker and George Culkin, *Defendants*

and

Eddie Thomas, Tommie Lee Williams, and Charlie Hunt, *Intervenors*

Findings of Fact, Conclusions of Law and Order Granting Temporary Restraining Order

On August 30, 1979, Plaintiffs initiated this action by filing a complaint seeking a preliminary injunction. On the same day plaintiffs moved the court to enter a temporary restraining order. On August 31, 1979, Eddie Thomas, et al., moved for leave to intervene. On August 31 also, counsel for all parties and movants for intervention appeared before the Honorable William Harold Cox, who then set the cause for hearing on Tuesday, September 4, 1979, on the motion to intervene and for appropriate further consideration.

On September 4, 1979, the hearing set by Judge Cox was held before the undersigned United States Circuit Judge sitting as a District Judge by designation. At the commencement of this hearing, the motion to intervene was granted. There followed a full adversary hearing which

developed the factual background of prior elections in supervisors' districts in Warren County and the feasability of holding a general election in said county on November 6, 1979, using 1929 beat lines. In that hearing two witnesses were introduced by Plaintiffs and five witnesses were introduced by Intervenors. Counsel for all parties participated in examination of witnesses and oral argument. No party advised the court of any problems as to absent witnesses or unavailable proof, nor did any party request a recess or continuance.

The Court having considered the amended complaint herein, the evidence adduced during the aforementioned hearing, and having heard oral argument of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiffs, registered voters of Warren County, Mississippi, seek a temporary restraining order or preliminary injunction prohibiting Defendants from conducting elections pursuant to the 1929 County Districting Plan, which defendants are now threatening to hold in November 1979.

2. Several attempts have been made by the Board of Supervisors of Warren County to redistrict the county to comply with the United States Supreme Court rulings relative to the one-man, one-vote 14th Amendment requirements and the Voting Rights Act of 1965. The latest attempt is a 1978 Plan. On July 31, 1979, a three-judge court for the District Court of the District of Columbia ruled the Board had failed to sustain the burden of proof imposed of Section 5 of the Voting Rights Act of 1965, in *Donnell v. United States*, Civil Action No. 78-0392, and therefore denied declaratory relief allowing use of the 1978 Plan. The *Donnell* decision is now on appeal to the United States Supreme Court.

3. In the course of announcing the decision on *Donnell*, the three-judge court concluded that the only legally en-

forceable plan of apportionment for county supervisor elections in Warren County under Section 5 is a plan which was adopted in 1929.

4. By order filed August 23, 1979, upon consideration of Intervenors' motion for clarification and for declaratory and injunctive relief, the three-judge District Court in *Donnell* declared that "an election should be held in Warren County under the legally enforceable election procedures of 1929, pending preclearance of any new procedure." Defendants have announced that they will hold a general election on November 6, 1979, using the supervisors' districts established in the 1929 Plan.

5. Under the 1929 Plan, the five districts of Warren County contain the following populations, according to the 1970 census:

District One	9,827
District Two	7,566
District Three	6,217
District Four	7,539
District Five	13,832

6. The equities which this Court has considered in the exercise of its injunctive powers are as follows:

a. The people of Warren County are entitled to exercise their right of suffrage to elect supervisors' districts officeholders, which has been denied since 1975.

b. Compliance with the 14th Amendment equal protection requirements ensuring each voter has an equal voice in elections is of equal dignity;

c. A decision by the United States Supreme Court in *Donnell* should be forthcoming in the near future; and

d. The 1980 census may require further reapportionment action by Warren County within the next year

7. While an order barring elections under the 1929 Redistricting Plan denies the people of Warren County the right of suffrage, substantially more harm would be incurred if these elections were allowed to be held. An injunction is necessary to the orderly administration of justice.

8. Preparations for the conduct of a general election in Warren County using the long-discarded 1929 beat lines would have to begin immediately. Witnesses indicated they might not be complete by November 6, 1979. Substantial expenditures of public funds would occur before a hearing on a preliminary injunction could be held. Immediate prohibition of this needless expense would be in Plaintiffs' interest and in the public interest also.

At the commencement of the proceedings on September 4, 1979, the Court advised that the hearing concerned a request for injunctive relief from the threatened general election on November 6, 1979, under the 1929 Plan. At the conclusion of the hearing on September 4, 1979, the Court announced its findings and stated that an order granting injunctive relief would be entered. Inquiry was made of the parties as to whether the form of the order should be a Temporary Restraining Order or a Preliminary Injunction. The parties were unable to agree. Plaintiffs and Defendants maintain that they were proceeding pursuant to their agreement, reached before intervention was allowed, to hear the matter on preliminary injunction. Intervenors state that they had no notice that the proceedings were to be other than a hearing on a temporary restraining order.

10. Rather than resolve the conflict, the Court will grant a Temporary Restraining Order and set this matter for further hearing on Preliminary Injunctive relief on September 14, 1979, at 9:00 a.m.

Conclusions of Law

1. This Court has jurisdiction over this action under 28 U.S.C. § 1343(3).

2. In accordance with the dictates of *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court must exercise its discretion in ruling on a motion for preliminary injunction based upon the equities involved and the applicable law.

3. The 1929 Apportionment Plan for Warren County violates the one-man, one-vote requirements of the 14th Amendment, and any elections held pursuant to the 1929 Plan would be unconstitutional.

4. The three-judge District Court in *Donnell* did not adjudicate the 1929 Plan to be valid under the 14th Amendment. Rather, it was implemented solely because it was the latest apportionment plan utilized in Warren County prior to November 1, 1964, the commencement date for plan preclearance under the Voting Rights Act.

5. The judicial authority of the District Court in *Donnell* was derived solely from Section 5 of the Voting Rights Act of 1965, a 15th Amendment statute. Therefore, the *Donnell* Court has no jurisdiction to consider, and did not consider, the 14th Amendment attack upon the 1929 Plan advanced in this litigation.

6. Because the 1929 Plan is patently violative of the 14th Amendment, Plaintiffs would suffer irreparable injury if the threatened general election is held using its beat boundaries. Neither Defendants nor Intervenors will suffer harm from halting the holding of an unconstitutional election.

Temporary Restraining Order

Based upon the foregoing findings and conclusions, Defendant members of the Warren County Election Commission and the Circuit Clerk of Warren County, and each and all of them, their agents, servants, employees, attorneys, and successors in office, who receive actual notice of this order by personal service or otherwise, be and they are hereby temporarily enjoined pending further order of this Court from holding elections in Warren County, Mississippi, on November 6, 1979, based upon the supervisors' districts designated in the 1929 Plan of apportionment of Warren County, Mississippi. This order shall expire on September 14, 1979, the parties having agreed to its issuance for this period of time.

This the 7th day of September 1979, at 4:10 o'clock p.m.

/s/ Charles Clark
United States Circuit Judge
sitting as District Judge by
designation

APPENDIX E

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J79-0425(c)

HERBERT C. STOKES, JR., DORIS ERWIN SANDERS, REMBERT C. WEBB, JR., WILLIAM SHEFFIELD, PAUL SHEFFIELD, and MARSHALL E. CALHOUN, *Plaintiffs*

vs.

WARREN COUNTY ELECTION COMMISSION, Mary Nancy Burkhardt, Chairman; Challie Turnstall; Lena Corbin; Lucille Lovett; Clint Whitaker; and GEORGE CULKIN, Circuit Clerk, *Defendants*

and

EDDIE THOMAS, TOMMIE LEE WILLIAMS, and CHARLIE HUNT; BOARD OF SUPERVISORS OF WARREN COUNTY, Clyde R. Donnell, Herbert Boler, Thomas F. Akers, Paul Pride, and James Andrews, *Intervenor-Defendants*

UNITED STATES OF AMERICA, *Amicus Curiae*

Findings of Fact, Conclusions of Law and Preliminary Injunction

Filed September 20, 1979

The findings of fact and conclusions of law in this order are based on evidence adduced at the hearing on preliminary injunction held on September 14, 1979, and at the initial hearing in this case on September 4, 1979. All findings of fact and conclusions of law contained in the court's Temporary Restraining Order dated September 7, 1979, are incorporated in this order.

To afford the people of Warren County the right of suffrage to elect supervisors' district officeholders and to comply with fourteenth amendment equal protection requirements, the court must promulgate an interim plan of its own governing the holding of a special election in Warren County, Mississippi, for the offices of that county elected by supervisor beats. The imminence of the general election to be held on November 6, 1979, and the accomplishment of those details necessary to permit the orderly holding of the required special election in districts different from those previously used will not allow the scheduling of this special election to coincide with the regular general election. However, those elected will be able to take office at the time terms begin for officials regularly elected in 1979.

A special election under this court's interim plan which protects fourteenth and fifteenth amendment rights, but does not prejudice the litigation position of the parties in this suit in *Donnell v. United States*, Civil Action No. 78-0392, United States District Court for the District of Columbia (appeal presently pending in the Supreme Court of the United States), is necessary to prevent irreparable injury, is in the public interest, and is demanded by a balance of equities.

The plan of redistricting supervisors' districts in Warren County, Mississippi, for this special election, which the court adopts as Part I hereof, complies with fourteenth amendment one-man, one-vote considerations. It also meets the racial standards declared by the United States District Court for the District of Columbia in *Donnell v. United States*. Compliance with the *Donnell* standard implies no judgment by this court that the adoption of that standard was correct. It is adopted here solely because this court considers it unseemly to deviate from that declaration for the limited purposes of the interim plan for this special election. The adoption of this plan is without prejudice to the rights of any party in *Donnell v. United States* to pursue that action to finality. If any incumbent supervisor

presently a plaintiff in *Donnell v. United States* is not reelected in the special election held under this order, he shall nevertheless be entitled to exercise the prerogatives of his former office for the sole purpose of pursuing that litigation to its proper conclusion in behalf of Warren County and at county expense.

The district boundary lines adopted by the court are designed to achieve the following population and racial distribution:

	Population	Total Nonwhite (%)	% Nonwhite VAP	Deviation
District 1	9068	3061(33.75%)	31.30%	+0.80%
District 2	9160	5982(65.30%)	62.74%	+1.82%
District 3	9075	6086(67.06%)	64.55%	+0.87%
District 4	8824	1878(21.28%)	19.47%	-1.91%
District 5	8854	1500(16.94%)	15.47%	-1.57%
TOTALS	44,981	18,507(40.14%)	38.47%	±3.73%

Although the court considers it undesirable to create a supervisor's district entirely within the city limits of a municipality, time and research resources did not permit the accomplishment of this and the more fundamental objectives for this special election. The lines do have the virtue of closely approximating the district boundary lines utilized by the County Election Commission in the preparation of its present poll books.

It Is Ordered that Mary Nancy Burkhardt, Challie Turnstall, Lena Corbin, Lucille Lovett, and Clint Whitaker, as members of the Warren County Election Commission; George Culkin, as Circuit Clerk; and Clyde R. Donnell, Herbert Boler, Thomas F. Akers, Paul Pride, and James Andrews, as members of the Warren County Board of Supervisors, and each and all of them, their agents, servants, employees, attorneys, and successors in office, who receive actual notice of this order by personal service or otherwise, be and they are hereby enjoined pending further

order of this court from holding elections in Warren County, Mississippi, on November 6, 1979, for offices based upon the supervisors' districts designated in the 1929 Plan of apportionment of Warren County, Mississippi. It is further ordered that the persons specified above shall, forthwith, begin preparations for and hold an election in accordance with Parts I and II hereof and shall observe the caveat stated above as to the pursuit of litigation in *Donnell v. United States* to finality.

I.

The special election required in Part II hereof shall be conducted and held utilizing supervisors' district lines located as specified in Exhibit A.

II.

While this special election should conform as nearly as possible to Mississippi law, time and expense factors prohibit reliance on all of those procedures. Therefore, it is ordered that the following processes and schedule be followed in holding this special election:

The Election Commission and the Circuit Clerk shall forthwith commence the task of conforming the poll books to the new district lines provided in Part I and shall complete the revisions as promptly as possible, but in any event within five weeks from the date of this order. *See* Miss. Code Ann. § 23-5-11 (1972). The Warren County Election Commission shall proceed immediately to make any changes in location of, or additions to, polling places which they deem necessary or desirable to facilitate voting under the plan adopted today and should publish these changes or additions in the notices required to be published by this order. Within ten days following the date of this order, the Election Commission shall commence the publication, in a newspaper of general circulation in Warren County, of notice of the special election and the newly drawn district boundaries, which publication shall continue at least

once each week for three consecutive weeks. If the Election Commission should determine that maps would more effectively communicate the boundary line locations to the public, maps may be substituted for or used to supplement the description contained in Part I. This same notice shall also be posted during the period of newspaper publication on the public bulletin board maintained at the Warren County courthouse. Twenty-one days from the date of first publication and posting, the same shall be complete. Within 14 days after publication is complete, qualified electors desiring to be candidates shall file qualifying petitions and affidavits and pay appropriate assessments as hereinafter particularized. *Cf. id.* § 23-5-19. Petitions shall include 50 signatures of registered electors residing in the candidate's district and shall be filed with the Circuit Clerk. *Cf. id.* § 23-5-3. Although Mississippi law only applies the 50-signature petition requirement to election commission candidates, the court considers that, absent a party primary, the requirement of these petitioning signatures is appropriate for all offices involved. The Corrupt Practices Act affidavit required by state law shall also be filed within this 14-day period with the Circuit Clerk. *See id.* § 23-3-3 through -7. The assessments provided for in Miss. Code Ann. § 23-1-33(c) and (e) shall be paid by each candidate for any office covered hereby to the County Election Commission within the same 14 days. *See id.* § 23-1-35. Any candidates who have previously qualified for any office to be elected on the basis of supervisor districts in the 1929 Plan of apportionment must requalify under this interim plan. However, any fee or assessment which such a candidate was required to pay to qualify for election under the 1929 Plan should be credited toward any fee or assessment he must pay to qualify under this interim plan. Upon the expiration of the 14-day period, the Circuit Clerk shall turn over the petitions and affidavits to the Election Commission. Within seven days of the receipt of these items, the Election Commission shall verify each petition, affidavit,

the payment of the required fee or assessment, and the statutory qualification of each candidate for the office petitioned for, and certify the list of qualified candidates. *See id.* § 23-5-197.

The election shall be held on Tuesday, November 27, 1979. Ballots will be printed and distributed and the election conducted in accordance with all provisions of Mississippi law not inconsistent with this order. *See id.* § 23-5-99 through -169. If no candidate receives a majority of votes in that election, the names of the two candidates having the highest number of votes shall be resubmitted to the voters in a runoff balloting to be held two weeks after the first balloting. *Id.* § 23-5-303. All candidates receiving a majority of votes shall be declared elected.

The term of office covered by this procedure shall begin on the first Monday of January 1980, concurrently with other county officer terms, and shall extend until their successors are duly elected under Mississippi law. This is an interim procedure for this special election only. Subsequent regular elections in these or other lawfully redrawn districts will be conducted in accordance with Mississippi law. In the event that Warren County receives clearance of a redistricting plan for supervisors' districts under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), whether in *Donnell v. United States* or by other means, they may apply to this court for such further equitable relief as is warranted at that time.

All questions related to the allowance of attorneys' fees under 42 U.S.C. § 1988, are reserved for later decision.

ORDERED, this 20th day of September 1979.

/s/ CHARLES CLARK
United States Circuit Judge
sitting as District Judge by
designation